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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

JOEL OLIVERA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, after a criminal defendant has invoked his right to counsel during custodial interrogation, police must respond to a question from the defendant specifically regarding the investigation by first readministering *Miranda* warnings, since *Miranda* warnings were intended only as a prophylactic measure to balance the coercive atmosphere of custodial interrogation.

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 164 Ill.2d 382, 647 N.E.2d 926 (1995), and a copy is attached as Appendix A. The order of the Illinois Supreme Court denying the People's petition for rehearing is attached as Appendix B. The opinion of the Appellate Court of Illinois, First District, in this case is reported at 246 Ill.App.3d 921, 617 N.E.2d 98 (1st Dist. 1993), and is attached as Appendix C.

STATEMENT OF JURISDICTION

The decision of the Illinois Supreme Court was originally entered on January 19, 1995. The People's petition for rehearing was denied on April 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Respondent Joel Olivera and Jorge Vargas were charged by indictment with the first degree murder of Raphael Torres. (C.L.R. 14-17) Respondent's severance motion was granted and simultaneous yet separate jury trials were held. Prior to trial, the respondent filed a motion to suppress his post-arrest statements on the grounds that he was denied the right to counsel during custodial interrogation as guaranteed by the Fifth Amendment to the Constitution. (C.L.R. 32-33) On July

13, 1989 after a hearing, the trial court denied the motion to suppress, finding that the respondent after invoking his right to counsel had initiated a conversation with the police and had waived his right to an attorney. (R. 207)

At the suppression hearing, the prosecution presented the testimony of Chicago Police Department Gang Crimes Specialist Darryl Gilliam who had been looking for respondent during the investigation of the shooting of Raphino Cortez. (R. 66) At about 5:45 p.m. on August 9, 1988, Officer Gilliam received a phone call from attorney John DeLeon who told the officer that the respondent was willing to surrender himself to the police. (R. 66, 68) At about 6:30 p.m., when the respondent came to the station with his father and DeLeon, Officer Gilliam explained that the respondent would be arrested for the aggravated battery of Raphino Cortez. (R. 69) He also explained that a line-up would be conducted. (R. 69) Mr. DeLeon told the officer that his client would not make a statement regarding this incident. (R. 70)

Mr. DeLeon gave the officer his phone numbers and left the station. The respondent was then formally arrested and advised of his rights by Officer Gilliam. (R. 71, 78) After completing the necessary paperwork, Officer Gilliam brought the respondent upstairs to the office of the violent crimes investigators and presented him to Detective Christon Kato. (R. 71)

Detective Kato and his partner Detective Johnson, who had been assigned to investigate the aggravated battery of Raphino Cortez, located witnesses and at about 10:45 p.m. conducted a line-up in which the respondent was identified. (R. 144, 145) After the line-up, Detective Kato

cleared the room of all the participants except the respondent. The respondent then asked the detective, "What happened?" (R. 147) Kato replied by telling the respondent that he had been positively identified. The respondent then asked, "What happens next?" (R. 147) At that point Kato told the respondent that he wanted to advise him of his rights, and he did so by telling the respondent that he had the right to remain silent, that anything he said would be used against him, and that he had the right to his lawyer during questioning. (R. 147) After hearing his rights, the respondent acknowledged that he understood them and then said that he was not alone when he shot the victim. (R. 148) The respondent then had a 10 to 15 minute conversation with the Detectives about the aggravated battery of Raphino Cortez. (R. 100, 149)

After this first conversation with the respondent, Detectives Kato and Johnson spoke with their Lieutenant about the Cortez case. (R. 101, 149) They learned that the homicide of Raphael Torres occurred two days prior to the aggravated battery of Raphino Cortez. (R. 101, 150) The homicide and aggravated battery offenses contained similarities in that they were both gang related drive-by shootings and the cars used in the crimes had similar descriptions. At approximately midnight the Detectives went back into the interview room with the respondent and re-advised him of his rights. (R. 102, 150, 151) When the respondent again said he understood his rights, the detectives said that they were going to ask about the shooting of Ralph Torres on July 29, 1988. (R. 103, 150) The respondent then gave a 15 to 20 minute statement about the homicide of Torres. (R. 103, 152) At approximately 3:00 or 3:30 a.m. the respondent gave a

court reported statement about the Torres homicide with an Assistant State's Attorney, Detective Kato, and Youth Officer Troike present. (R. 152-153)

After hearing all of the evidence and arguments concerning the motion to suppress, the trial court denied the motion. (R. 208) In its ruling, the court found that the respondent had invoked his right to counsel when he turned himself into the police regarding the aggravated battery of Raphino Cortez. (R. 204) Noting discrepancies between the testimony presented by the defense and the prosecution, the trial court resolved them in favor of the prosecution. The court went on to find that the respondent had initiated a conversation with Detective Kato and had waived his right to counsel. (R. 207) With reliance on this Court's decisions in *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093 (1988), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), the trial court found that the State had met its burden of establishing the voluntariness of the statements. (R. 208)

Following his conviction and sentence for first degree murder, the respondent appealed directly to the Illinois Appellate Court, First District, claiming that the trial court had improperly denied his motion to suppress. In reversing the conviction, the appellate court held that by asking the question, "What happened," immediately after the lineup, the respondent did not initiate a conversation evincing a desire to have a generalized discussion of the investigation. *People v. Olivera*, 246 Ill.App.3d 921, 617 N.E.2d 98 (1st Dist. 1993).

The Illinois Supreme Court granted the People of the State of Illinois leave to appeal from the appellate court's decision. A divided Illinois Supreme Court on January

19, 1995, affirmed the appellate court's reversal of the respondent's conviction. *People v. Olivera*, 164 Ill.2d 382, 647 N.E.2d 926 (1995). In that opinion the majority held that Detective Kato violated the respondent's right to counsel by truthfully answering the question, "What happened?" According to the court, the detective's failure immediately to re-advise the respondent of his rights rather than to respond to the question rendered involuntary the respondent's waiver of his right to counsel. 164 Ill.2d at 392. The majority stated its holding as follows: "If a question by an accused who has invoked his right to the presence of counsel during custodial investigation is to be deemed an initiation of a conversation in a manner evincing a willingness and a desire for a generalized discussion concerning the investigation, the proper response of the police to such a question must be to advise the accused of his rights, as was done by the officer in *Bradshaw*, and not to provide an answer, in the absence of such warnings, that police should know is reasonably likely to elicit an incriminating response." 164 Ill.2d at 392.

REASONS FOR ALLOWING THE WRIT

AFTER A CRIMINAL DEFENDANT IN CUSTODY HAS INVOKED HIS RIGHT TO COUNSEL DURING INTERROGATION, THE CONSTITUTION DOES NOT REQUIRE POLICE TO RESPOND TO A QUESTION FROM THE DEFENDANT SPECIFICALLY REGARDING THE INVESTIGATION BY FIRST READMINISTERING *MIRANDA* WARNINGS, SINCE *MIRANDA* WARNINGS WERE INTENDED ONLY AS A PROPHYLACTIC MEASURE TO BALANCE THE COERCIVE ATMOSPHERE OF THE CUSTODIAL SETTING.

The decision of the divided Illinois Supreme Court in this case is but one instance of the confusion present in the various courts of this nation as a result of the plurality opinion in the case of *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830 (1983). In *Bradshaw* the Court was presented with a criminal defendant who had invoked his right to counsel during custodial interrogation, but then began a conversation with police. In their opinions both the plurality and the dissent in *Bradshaw* set out to apply the principles of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), which itself was an outgrowth of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)

Of concern to this Court in *Miranda* was the danger that the environment in which police question an arrested person may be a coercive factor tending in itself to overcome the arrestee's desire to invoke his right to be free of self-incrimination. To offset the possibly coercive nature of the surroundings, the Court required as a prophylactic measure that the police first inform a suspect in custody that he has the right to remain silent, that his statements may by used against him, that he has the

right to counsel during questioning, and that, if he is indigent, counsel would be appointed. 384 U.S. at 444. "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U.S. at 458.

The defendant in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), was admonished as required by *Miranda* and then invoked his right to counsel. Despite the invocation of the right to counsel, officers later spoke with the defendant, after again informing him of his rights, and obtained a statement from him. The concern in *Edwards* was the possibility of police badgering a defendant who has invoked his right to counsel. To prevent such badgering the Court reached the following holding:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. 451 U.S. at 484.

Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830 (1983), was a plurality opinion dealing with a defendant who, as anticipated in *Edwards*, initiated conversation with the police. In *Bradshaw*, the defendant invoked his right to counsel and was being transported from the police station to the county jail when he asked a police

officer, "Well, what is going to happen to me now?" The officer's immediate response was to say, "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will." After the defendant acknowledged understanding these rights, the two had a discussion about the charges and where the defendant was being taken. During the conversation the police officer suggested that a polygraph examination might be to the defendant's advantage. The next day the defendant took a polygraph examination after which he made inculpatory statements to the examiner.

In *Bradshaw* the four Justices in the plurality and the four concurring in the dissent all agreed that a two step process is required to determine the validity of a waiver of a previously invoked right to counsel by a defendant who then speaks to the police. The first step is to establish whether the suspect has indeed initiated further conversation as contemplated in *Edwards*. If so, the second inquiry is whether, under the totality of the circumstances, the purported waiver of the right to counsel was knowing and voluntary, taking into consideration the fact that the accused reopened the dialogue. 462 U.S. at 1043.

The disagreement between the two opinions in *Bradshaw* arose over whether the defendant's question, "Well, what is going to happen to me now?" was actually an initiation of further conversation. While recognizing that some questions by an accused, such as a request for a drink or a request to use the telephone, relate only to routine incidents of custody and are not an initiation of

further communication, the plurality found that the defendant's question was one which "evinced a willingness and a desire for a generalized discussion about the investigation," and thus was the type of initiation envisioned by *Edwards*.

In language similar to but slightly different from the plurality, the dissenting Justices defined an "initiation" by a defendant as "communication or dialogue *about the subject matter of the criminal investigation.*" 462 U.S. at 1054. (Emphasis in the original). Unlike the plurality, however, the dissent found that Bradshaw's question indicated only a concern about where he was being taken rather than an invitation to discuss the investigation.

Neither opinion in *Bradshaw* considered the importance of the fact that the police officer, before answering the defendant's question, first reminded him of the right to counsel which he had previously invoked, a fact which in the present case forms the basis of the controlling opinion and upon which the majority distinguishes this case from *Bradshaw*. Previous cases from various jurisdictions have, with differing results, however, discussed the significance of the officer's re-administration of the *Miranda* rights in *Bradshaw*.

One year after the *Bradshaw* decision the Minnesota Supreme Court issued its opinion in *State v. Jackson*, 351 N.W.2d 352 (1984). In *Jackson*, the defendant, after invoking his right to counsel and being placed in the county jail, was watching a segment on a television news show about the crime of a new prisoner at the jail. The defendant started discussing the program with a correctional officer and said, "You know they should bring back the death penalty for things like that." In the course of

the conversation, the officer, without advising the defendant of his rights, made a statement which evoked from the defendant an inculpatory statement concerning his own crime. With reliance upon *Bradshaw*, the Minnesota court upheld the conviction and held that the jailer "was not required to interrupt Jackson's spontaneous and volunteered statements to warn him of his rights under the fifth amendment." 351 N.W.2d at 356.

In *Rogers v. United States*, 483 A.2d 277 (D.C. App. 1984), the defendant, who had invoked his right to silence, told a police officer, "I had to sacrifice him." The officer immediately asked questions which eventually led the defendant to make admissions and to lead police to the victim's body and the murder weapon. On review the court considered the legal significance of the officer's failure to immediately re-advise the defendant of his rights as did the officer in *Bradshaw*. Unlike the majority in the present case, however, the court in *Rogers* treated that fact as one of the totality of circumstances used to determine a knowing and voluntary waiver rather than as a tool to determine whether the defendant initiated communication. The court concluded that, while it might have been preferable for the officer to re-administer the rights, a requirement that fresh warnings be given would be "an unjustifiable restriction" on the investigative process. 483 A.2d at 285.

In other cases since *Rogers*, courts faced with situations similar to *Bradshaw* have also considered the failure to give new *Miranda* warnings as a factor which might have some bearing on the issue of whether the waiver of a Fifth Amendment right was knowing and voluntary, that is, in the second portion of *Bradshaw's* two step analysis. In *State v. Castaneda*, 150 Ariz. 382, 724

P.2d 1 (Ariz. Sup., 1986), the court disagreed with the defendant's argument that the officer's immediate response to a volunteered statement should have been a repetition of the *Miranda* warnings. The court held that new warnings would be required only if circumstances indicated that the defendant was not fully aware of his rights. In *Moore v. Dugger*, 856 F.2d 129 (11th Cir. 1988), the defendant tried to distinguish his case from *Bradshaw* by pointing out that in *Bradshaw* the officer's immediate response to the defendant's question was to inform the defendant of his rights. The Court of Appeals rejected the argument and found the difference in procedure not to be a key distinguishing factor. Rather than distinguish its case from *Bradshaw* on the basis which the defendant suggested, the court distinguished it from *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), on the grounds that the critical factor in *Edwards* was not the failure to repeat the warnings but police misconduct in badgering the suspect. 856 F.2d at 134.

The defendant in custody in *United States v. Velasquez*, 885 F.2d 1076 (3rd Cir. 1989), asked a narcotics agent, "What is going to happen?" The agent truthfully responded that she would be brought before a magistrate for the setting of bail. When the defendant then asked about her co-arrestee, the agent misinformed her that her companion was going to testify against her. The defendant then made certain admissions. Noting that since *Bradshaw* "uncertainty persists as to what constitutes an initiation," the Court of Appeals said it was following the plurality in *Bradshaw* and found that the defendant's question evinced a willingness for a generalized discussion about the investigation. 885 F.2d at 1085. The court went on to discuss the validity of the defendant's waiver

of her previously invoked right to counsel and found that the failure to provide "new *Miranda* warnings impacts only slightly on the validity of her waiver." 885 F.2d at 1087.

In contrast to the cases cited above is a recent opinion from the Supreme Court of California, *People v. Sims*, 20 Cal.Rptr.2d 537, 853 P.2d 992 (Cal. Sup. 1993). In that case, after having invoked his right to counsel, the defendant, referring to his extradition matters, asked "what was going to happen from this point on." The officer explained the extradition proceedings and continued to discuss the case for which the defendant had been arrested. The California court held that by his question concerning what was going to happen to him the "defendant did not open the door to interrogation after previously having invoked his *Miranda* rights." 853 P.2d at 1013. The court went on to distinguish the case before it from *Bradshaw* on the grounds that the officer in *Bradshaw* had responded to the defendant's question by immediately readministering the *Miranda* rights. The failure do so and the failure then to obtain from the defendant a waiver of rights, the California court found to be improper.

In the present case uncertainty persists surrounding a test to determine whether "the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484. The solution of the majority in this case was to hold that it is essential for an officer to respond to a suspect's question by immediately giving fresh *Miranda* warnings if the question "is to be deemed an initiation of a conversation in a manner evincing a willingness and a desire for a generalized discussion concerning the investigation. . ." 164 Ill.2d at

392. An advantage of such a rule may be the ease with which it can be applied.

Simplicity aside, however, the majority's solution, because it suggests that the *Miranda* admonitions should serve a dual purpose of both preceding custodial interrogation to balance the inherently coercive setting and also to later determine whether an officer's remarks are indeed interrogation at all, may well lead to "the inevitable consequence of muddying *Miranda's* otherwise relatively clear waters." *Moran v. Burbine*, 475 U.S. 412, 426, 106 S.Ct. 1135 (1986). Since the *Miranda* warnings are prophylactic measures intended to balance the coercive atmosphere of custodial interrogation, they only "come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689 (1980). Once *Miranda* warnings have achieved the necessary balance and a suspect has asserted his rights, the constitutional concern shifts to the possibility of the police badgering the suspect by continued interrogation. *Edwards v. Arizona*, 451 U.S. 477, 487, 101 S.Ct. 1880 (1981). At this point fresh *Miranda* warnings serve no purpose. If the police initiate further interrogation, they have violated *Edwards*. If the defendant initiates further communication, the only inquiry left is whether, under the totality of the circumstances, he has knowingly and voluntarily waived his rights. *Bradshaw*, 462 U.S. at 1047.

The members of the Illinois Supreme Court reached differing opinions because, like other courts, it was confused by the plurality decision in *Bradshaw*. The Illinois court's majority distinguished *Bradshaw* on the basis of a fact that most other, but not all, courts found to be

inconsequential. For these reasons the People of the State of Illinois ask that this Honorable Court grant this Petition for a Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully prays that this Honorable Court grant the instant petition for Writ of Certiorari.

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